

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Application  
of Barbara A. Orr to Place Structures  
in Mille Lacs Lake.

FINDINGS OF FACT,  
CONCLUSIONS AND  
RECOMMENDATION

The above-entitled matter came on for hearing before Bruce D. Campbell, Administrative Law Judge, on September 25 and 26, 1985, at the Aitkin County Courthouse in Aitkin, Minnesota.

Appearances: Donald A. Kannas, Special Assistant Attorney General, Second Floor, Space Center Building, 444 Lafayette Road, St. Paul, Minnesota 55101, appeared on behalf of the Department of Natural Resources (Department or DNR); and William G. Peterson, William Peterson & Associates, Ltd., Attorneys at Law, 8400 Lyndale Avenue South, Suite 7, Minneapolis, Minnesota 55420, appeared on behalf of Barbara A. Orr (Mrs. Orr or Applicant).

The record closed on January 31, 1986, after the receipt by the Administrative Law Judge of the final post hearing reply brief.

Notice is hereby given that, pursuant to Minn. Stat. 14.61 the final decision of the Commissioner of Natural Resources shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Exceptions to this Report, if any, shall be filed with the Commissioner of Natural Resources, Joseph N. Alexander, Third Floor, Centennial Office Building, 658 Cedar Street, St. Paul, Minnesota 55155.

STATEMENT OF ISSUE

The issue to be determined in this proceeding is whether Barbara A. Orr should be granted a permit to place structures in Lake Mille Lacs adjacent to her commercial campground.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. On October 24, 1984, Barbara A. Orr submitted a permit application to the Department requesting a permit to construct a "waterbreak" in Lake Mille Lacs adjacent to her commercially operated campground. Pet. Ex. 3.

2. The structures, as more particularly described in Pet. Ex. 2, consist of two natural rock breakwaters placed 120 feet apart and extending both perpendicular and parallel to the shoreline. The shoreline in this area runs generally north and south. The southerly structure would extend from the shoreline perpendicularly a distance of 90 feet and then at an angle of 45' to the north for a distance of approximately 100 feet. The northerly structure would extend perpendicular to the shoreline approximately 90 feet with a lateral arm to the south approximately 25 feet long. The configuration of the structures leaves an entrance between the separate structures approximately 20 feet wide. The height of the structures would be approximately two feet above the ordinary high water mark. Within the protected area created by the structures, the Applicant would construct a dock with slips for 20 boats. In conjunction with the Application, permission to perform maintenance dredging of the area within the two structures was also requested.

3. On November 27, 1984, the project was approved by the Aitkin County Soil and Water Conservation District. Pet. Ex. 6; Pet. Ex. 8.

4. An identical application was made to the United States Army Corps of Engineers.

5. On December 18, 1984, the Corps of Engineers approved the project. Pet. Ex. 17. It was the opinion of the Corps that the project would not adversely affect the game fish population of the lake.

6. On December 21, 1984, the Minnesota Pollution Control Agency approved the project, provided that permits were issued in accordance with the requirements of the Department. Pet. Ex. 19.

7. On March 14, 1985, the Commissioner notified the Applicant that the permit would be denied and that formal findings would be transmitted within 30 days. Pet. Ex. 25.

8. On April 10, 1985, the Commissioner, by Order, deried the Application both as to the primary request to place the structures heretofore described in Lake Mille Lacs and as to an alternative request to constract an inland harbor. Pet. Ex. 30.

9. The Applicant filed a timely Notice of Appeal DNR Ex 5

10. On August 23, 1985, the Commissioner issued a Notice and Order for Hearing. DNR Ex. 1.

11. The Notice of Hearing was published in the EQB Monitor of September 9, 1985. The Notice was published in the Aitkin Independent Age on August 28, 1985 and September 4, 1985. DNR Ex. 4.

12. The Permit Application, the Notice of Hearing and the Affidavits of Publication are proper in form, content, execution and filing.

13. Mrs. Barbara A. Orr operates Orr's campground and trailer park in the Malmo Bay Area of Lake Mille Lacs, a distance south of the Town of Malmo in Aitkin County, Minnesota. Malmo Bay is located in the northeastern portion of the lake. The campground and trailer park is licensed for 120 sites, 2/3 of

which are occupied by essentially permanent residents and 1/3 of which are occupied by temporary guests. The campground and trailer park has a dining facility which also caters to transient fishermen.

14. The campground occupies approximately 13 acres and has 344 feet of shoreline, characterized by the presence of fine sugar-like sand. Pet. Ex. 68.

15. Mrs. Orr currently maintains permanent docks 150 feet long. In addition, approximately 80 mooring posts are located up to 50 feet past the existing dock. The posts are approximately 40 feet apart, When docking space is unavailable boats are attached to the posts.

16. The campground has a concrete boat ramp from which boats are launched and retrieved with the aid of a four-wheel drive vehicle or a backhoe. The boat ramp is frequently clogged with sand as a result of the winds and bottom movement hereinafter described. Mrs. Orr has received a DNR maintenance permit to remove sand from her boat ramp, and does so periodically.

17. The shallowness of the water, the presence of fine sand and the frequent rough water make the safe launching and retrieval of boats at the Orr's facility difficult.

18. Lake Mille Lacs is an oval, shallow fresh water lake which has a surface area of approximately 200 square miles and a drainage area of approximately 400 square miles. The prevailing winds during the spring and summer, the open water fishing season, are from the south and southwest.

19. The shallowness of the northeastern portion of the lake and the prevailing wind patterns make the Malmo Bay area particularly susceptible to extremely rough water conditions.

20. During the fishing season of 1985, at least 12 strong storms caused extreme difficulty in retrieving boats at the Orr Campgrounds. In the high winds and choppy water, there is a likelihood of damage to boats and docks and of personal injury. Frequently, boats must be removed at night in high winds under extremely unsafe conditions. When a severe storm approaches, all boats at the Orr Campground must be removed from the water.

21. In the last several years, a number of persons have been injured attempting to retrieve boats in high winds.

22. There is no evidence in the record of the average number of boats launched and retrieved from the Orr Campground on any particular day. At its busiest time, opening weekend, the campground may handle as many as 200 boats.

23. During opening day weekend of 1985, tornado warnings and storms made it necessary to remove as many as 200 boats from the water under extremely adverse conditions.

24. The proposed structures will be beneficial by creating a sheltered area for the launching and retrieval of watercraft. It will eliminate the threat to physical safety posed by the current open condition of the Orr dock, The calmer water will enable a larger number of boats to be retrieved

more quickly and will permit the Applicant to moor her large launch at the campground, instead of at a neighboring resort with an inland harbor.

25. The construction of the structures would prevent drift material from filling the boat launching area and thus make it possible to launch boats without driving a four-wheel drive vehicle into the water. TR. 281.

26. Lake Mille Lacs, due to its oval shape without substantial bays or sheltered areas, has not experienced a significant rough fish problem. The shearing action of moving sand along the bottom and the prevailing wind patterns prevent the growth of vegetation which is conducive to the spawning and feeding of carp and bullhead. The lake is the state's most important lake for the production of walleyes.

27. The quieter water partially enclosed by the structures would provide some habitat which may be favored by carp and bullheads.

28. The quieter, shallow waters within the structures will produce an undetermined amount of aquatic vegetation which may be used by certain species of rough fish to reproduce and feed.

29. There is no evidence in the record regarding the additional quantity of rough fish that would be introduced into Lake Mille Lacs as a consequence of the Orr project.

30. The construction proposed in the Application would not have a direct effect on the walleye population of Lake Mille Lacs or significantly affect the presence of rough fish in the lake.

31. The Department is concerned about creating an unfavorable precedent if construction is allowed. TR. 539. For the last 15 years, the Department has imposed an unofficial moratorium on the granting of permits like this on Lake Mille Lacs. The Department reasons that all future construction permits will have to be granted if the unofficial moratorium is not followed and the cumulative effect will be detrimental to the walleye population of the lake.

32. Beginning in the early 1970's, the Department of Natural Resources adopted an informal moratorium on the construction of inland harbors and offshore structures in the lake. Prior to the moratorium, 32 inland harbors and 8 breakwaters and inlake structures had been constructed in Lake Mille Lacs. A number of the protected areas are in Malmo Bay which is subject to the wind and water conditions heretofore described.

33. Gill net information and creel census data from the early 1960's until the present date indicate that the walleye population in Lake Mille Lacs is as high as it has ever been. There is no significant rough fish incursion. TR. 553-554.

34. Although indicating an intention to do so, the Department has never undertaken a study of the effect of inland harbors and inlake structures on

the walleye population of the lake.

35. The unofficial policy of the DNR of not allowing additional inland harbors or structures in Lake Mille Lacs was not promulgated as a rule under the Administrative Procedures Act.



36. The project will result in some erosion of the sand shoreline adjacent to the northern most structure for a distance of up to several hundred feet.

37. The erosion could be controlled through the use of riprap.

38. Carp exhibit some rooting tendency which may have a minor adverse effect on water quality. TR. 491.

39. The beach and shoreline in front of the Orr Campground provides no particular habitat for walleyes or other game fish and is not located in a posted fish spawning area.

40. The posts currently placed several hundred feet into the lake provide no protection for boats in the event of storms. Moreover, placing and removing boats at the posts is dangerous in rough water.

41. Boatlifts could not be used to provide protection to the numerous boats launched and landed at the Orr facility. Each lift can accommodate only one boat.

42. There is not sufficient area on the Orr property for the creation of an inland harbor of sufficient size to service the commercial traffic at the campground. TR. 75; TR. 369-370. Moreover, an inland harbor with a mouth along the Orr shoreline would be subject to frequent sand accumulations, requiring continual dredging and maintenance. TR. 634-635.

43. On August 31, 1984, a representative of the Army Corps of Engineers and the DNR met with Mrs. Orr at her campground. At that meeting, both the DNR representative and the representative of the Army Corps of Engineers dissuaded Mrs. Orr from proposing an inland harbor based on the practicality of the proposal and the history of the denial of such requests. TR. 163; TR. 75-76; TR. 634-635. Mrs. Orr proceeded with the current proposal primarily on the basis of the representations of the governmental officials.

44. The Department of Natural Resources has indicated on a number of occasions that an inland harbor at the Orr property would be objectionable. TR. 497; TR. 541-542; TR. 618, 620. In her permit application, Mrs. Orr made the alternative proposal of an inland harbor. Pet. Ex. 3. The Order of the Commissioner denied both the proposed breakwater and the alternative of an inland harbor.

45. As a consequence of Findings 42-44, supra, an inland harbor at the Orr Campground is not a feasible alternative.

46. A winching system would not be acceptable since it would not offer protection in the event of storm conditions and would not appreciably reduce physical injury or property damage experienced in retrieving boats under adverse conditions

47. The erosion to the sand shoreline north of the northernmost structure could be ameliorated by depositing the sand periodically taken from the protected area into any portion of the shoreline subject to erosion or scour.

48. Creating some additional habitat suitable for the reproduction and feeding of rough fish could be mitigated by the periodic removal of any accumulations of aquatic vegetation and by including the structures the maximum openings as are consonant with their structural stability.

49. The proposed construction allows for the mooring of twenty boats, or approximately .17 protected moorings for each authorized campsite or mobile home site at the Orr Campground.

50. Due to the shallowness of the water along the Orr property, there is no water traffic near the shoreline. Moreover, the proposed structures will extend some 80 to 100 feet less out into the water than the existing docks and mooring posts, reducing the waterward occupation by 112.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

#### CONCLUSIONS

1. The Administrative Law Judge and the Minnesota Department of Natural Resources have jurisdiction over the Permit Application herein.

2. All relevant substantive and procedural requirements of law and rule have been fulfilled.

3. At the time Barbara A. Orr made an application to place structures in Lake Mille Lacs, it constituted protected public waters of the state as those terms are used in Minn. Stat. Ch. 105.

4. The structures herein sought to be placed in Lake Mille Lacs will not obstruct navigation or create a water safety hazard.

5. A grant of the permit herein will not be detrimental to significant fish and wildlife habitat or protected vegetation.

6. The proposed project represents the minimal impact solution to a specific need with respect to all other reasonable alternatives.

7. The project will involve a minimum of encroachment, change, or damage to the environment, including but not limited to fish and wildlife habitat, navigation, water supply, and storm water retention.

8. The proposed structures are consistent with applicable governmental management standards and ordinances for the waters involved.

9. Modifications to the plan proposed and the imposition of additional requirements on the Applicant, as discussed in the Findings and Recommendation herein, would mitigate any adverse effects on the physical or biological

character of the waters.

10. An alternative dock or inland facility at the Orr Campground is infeasible.

11. The structures are adequate in relation to the appropriate engineering factors listed in the applicable Minnesota Rules.

12. The application and plan for construction is adequate in relation to the geologic and hydrologic factors contained in Minnesota Rules.

13. The size and shape of the structures are designed in a compact fashion so as to blend in with the surrounding shoreline while minimizing the surface area occupied in relation to the number of watercraft to be served.

14. The structures do not exceed the minimum thickness necessary to withstand the anticipated forces consistent with maintenance requirements and are constructed of natural materials.

15. The structures minimize encroachment waterward of the ordinary high water mark and provide a number of protected mooring spaces consistent with Minnesota Rules.

16. The Applicant herein has established by a preponderance of the evidence that the application is reasonable, practical and will adequately protect the public safety and promote the public welfare if the conditions for mitigation of the possible adverse environmental consequences discussed in the Findings herein are made a condition of the permit.

17. The Applicant has met any burden of proof under the Minnesota Environmental Protection Act and the Minnesota Environmental Rights Act relating to a lack of feasible and prudent alternatives.

18. The proposed construction does not violate any Departmental rule relating to excavation in protected waters,

19. Any of the foregoing Findings of Fact which are more properly termed Conclusions and any of the Conclusions herein contained more properly termed Findings of Fact are hereby expressly adopted as such.

Based on the foregoing Conclusions, the Administrative Law Judge makes the following:

#### RECOMMENDATION

It is the recommendation of the Administrative Law Judge that the Commissioner grant the Application herein to construct the structures in Lake Mille Lacs in accordance with the submitted design with the following conditions:

1, In addition to the water connections to the lake through the navigation channel and through the natural rock structure, the Commissioner should designate such reasonable culverts or other interruptions in the wall surface as will accomplish adequate water flows and allow maximum particulate movement, consonant with the stability and purpose of the structures.

2. The Applicant must periodically remove from the area of sheltered waters any aquatic vegetation that occurs under such permits or conditions as may be determined by the Commissioner.

3. The Applicant must install and maintain on the structures such navigational lights and guiding devices as are required by the United States Coast Guard.

4. The Applicant must place the sand material taken from within the structures and adjacent areas to such reasonable locations upland or adjacent to the structure or such areas in the bed of Lake Mille Lacs as may sustain any scouring or erosion as a result of the structures as may be directed by the Commissioner.

Dated this 3rd day of March, 1986.

BRUCE D. CAMPBELL  
Administrative Law Judge

#### NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Court Reported by  
Mary Ann Hintz  
Route 4, Box 142  
Isanti, MN 55040

#### MEMORANDUM

Barbara Orr's application for a permit to place structures in Lake Mille Lacs is made pursuant to Minn. Stat. 105.42 (1984), which requires permission from the the Commissioner of Natural Resources prior to certain described construction in public waters of the state. Lake Mille Lacs is, certainly, within the definition of public waters of the state. Minn. Stat. 105.45 (1984), sets the standards for the grant of the permit herein. The statute, in relevant part, provides:

If the commissioner concludes that the plans of the applicant are reasonable, practical, and will adequately protect public safety and promote the public welfare, he shall grant the permit . . . In all other cases the commissioner shall reject the application or he may require such modification of the plan as he deems proper to protect the public interest. In all permit applications, the applicant has the burden of proving that the proposed project is reasonable, practical and will adequately protect the public safety and promote the public welfare.





In granting a permit the commissioner may include therein such terms and reservations with respect to the amount and manner of such use or appropriation or method of construction or operation of controls as appears reasonably necessary for the safety and welfare of the people of the state

Hence, it is apparent that the burden of proof herein is on the Applicant.

Since the environment is involved, however, the Commissioner must also comply with the Minnesota Environmental Rights Act, Minn. Stat. Ch. 116B (1984), and the Minnesota Environmental Policy Act, Minn. Stat. Ch. 116B (1984). Basically, those Acts prohibit the grant of any administrative permit which will impair, pollute, or destroy the air, water, land or other natural resources of the state if there is a feasible and prudent alternative consistent with reasonable requirements of the public health, safety and welfare and the state's paramount concern for the protection of the environment. Minn. Stat. § VXEG 0LQQ Stat. 116D.04, subd. 6 (1984). A violation of the Minnesota Environmental Rights Act or the Minnesota Environmental Policy Act may be established by showing that a governing rule is violated. Minn. Stat. 116B.02, subd. 5 (1984).

The main Departmental rule of concern in this proceeding is Minnesota Rule 6115.0210, subp. 3, which lists conditions under which structures may not be placed in public waters. There is no serious contention that the structures Mrs. Orr intends to place in the lake will obstruct navigation or create a water safety hazard. Nor is there any suggestion that the structures will be used for human habitation, as a boathouse, or as a structure including walls, a roof or sewage facilities. The primary objection of the DNR relates to Minnesota Rule 6150.0210, subp. 3B, which prohibits the placement of structures when the work "will be detrimental to significant fish and wildlife habitat or protected vegetation. Construction is prohibited in posted fish spawning areas." It is stipulated that the Orr beachfront is not a fish spawning area. The waters in front of the Orr property provide no particularly beneficial walleye or game fish habitat,

The position of the Department, apparently, is that the word "habitat" as contained in the rule refers to the entirety of the shoreline of Lake Mille Lacs. It is argued that the structure will enclose an amount of water, foster the development of vegetation within the protected area and serve as a place of incubation for unwanted rough fish. Some undetermined level of rough fish may compete with walleye, the preferred species, for food and may make fishing on the lake generally less desirable.

The record, however, leads only to the conclusion that the development proposed by Mrs. Orr will not have a significant impact on any particular habitat for walleye on Lake Mille Lacs or upon the presence of rough fish in the lake. Some 40 inland harbors and inlake protected areas were created prior to the moratorium announced by the DNR in the early 1970s. However, the record establishes that the walleye population of the lake has never been higher and that rough fish pose no current problem for the lake. As noted in the Findings, the real concern of the Department is not the effect of Mrs. Orr's proposal alone, but rather the effect it may have as a precedent for other development in the lake. It was conceded by the DNR that rough fish

habitat in the lake is not a problem and that Mrs. Orr's proposed construction itself would not threaten the walleye or game fish population of the lake. TR. 512; TR. 539; TR. 531; TR. 540.

Since the unofficial moratorium on construction in Lake Mille Lacs was adopted by the Department in the early 1970s, no study of the degree to which inland harbors or inlake structures contribute to the rough fish population has been undertaken by the Department. There has been no showing in any proceeding, whether contested case or rulemaking, that the "no build" policy it has adopted is necessary and reasonable. Simply stated, the Department has attempted to place Lake Mille Lacs in a total "no build" condition despite the existence of rules allowing building if an applicant meets the stated criteria.

The Department argues that its position with respect to the interpretation of its rule is reasonable since it would be required to grant the permits of all similarly situated individuals, eventually resulting in a cumulative adverse effect on the walleye population of the lake. *Northwestern college v. City of Arden Hills*, 281 N.W.2d 865 (1979). That decision, however, does not prohibit the Department of Natural Resources from protecting the integrity of Lake Mille Lacs. The touchstone of the *Northwestern College* decision is that there may not be invidious and arbitrary discrimination against applicants similarly situated. It cannot be seriously argued that every permit application, irrespective of the area of the lake involved or the need demonstrated, would be identical. See, *Prior Lake Aggregates, Inc. v. City of Savage*, 349 N.W.2d 575, 580 (Minn.App. 1984).

Moreover, subsequent applicants may not otherwise be similarly situated. If additional structures or inland harbors are created in the lake, the effect of those structures and additional inland harbors would bear on the propriety of granting any further permit. A later applicant for a permit in Lake Mille Lacs is not similarly situated with a current applicant.

What is needed is for the Department not to abdicate its regulatory authority by an unwritten moratorium, but to determine the point at which a demonstrable adverse effect on the game fish population of the lake may be established in a contested case proceeding. They have not done so here.

Noreover, it is apparent that the specter of an adverse precedent is not sufficient grounds for abrogating or refusing to enforce an existing rule. In *Odell v. City of Eagan*, 348 N.W.2d 792 (Minn.App. 1984), the Court refused to accept as a reason for denying an otherwise valid permit application the

precedential value of the action, Moreover, in Cardon v. Cromarty, 221 N.Y.S.2d 924, 926 (Sup. Ct. 1961), the Court held that each application must be viewed on its own merits without reference to other applications.

What the Department has attempted to do is place Lake Mille Lacs in a special protected category, denying all inlake and inland construction. Its attempt to do so, irrespective of the directive of its rules, is, in itself, an invalid unpromulgated rule. It is clear that a moratorium to suspend the application of an existing statute or ordinance is inappropriate. The Minnesota State Supreme Court has expressly disapproved such moratoriums. Ostrand v. Village of North St. Paul, 147 N.W.2d 571 (Minn. 1967); Alexander v. City of Minneapolis, 125 N.W.2d 583 (Minn. 1963).

The actions of the Department in imposing an unofficial moratorium on future development irrespective of a demonstrated impact on the fish resources of Lake Mille Lacs is clearly an invalid, unpromulgated rule. In *Laura Baker School v. Department of Human Services*, 377 N.W.2d 465 (Minn.App. 1985), the Commissioner of Human Resources imposed an administrative moratorium on the application of certain of the Agency's rules. The Court of Appeals hold:

The administrative moratorium adopted by DHS was illegal. The moratorium is clearly within the statutory definition of a rule . . . . Minn. Stat. 14.02, subd. 4 (1982). In the case of the moratorium, DHS adopted a new policy for determination of need. Rather than considering the various factors set out in Minn.R. 9525.0080, it instead adopted a flat rule that no determinations of need would be issued. When a rule such as this is not adopted according to the procedures set out in the APA, Minn. Stat. 14.131 - .365, the rule will be invalidated. *White Bear Lake Care Center*, 319 N.W.2d at 9.

It is clear that the "no build" status into which the Department has placed Lake Mille Lacs is an abrogation of DNR's existing rules regarding the placement of structures in public waters.

The Department may argue the reasonableness of its position and the need to protect Lake Mille Lacs, the most valuable walleye resource of the State of Minnesota, from any type of degradation. If the necessity and reasonableness for such a rule can be established, the Department should engage in a rulemaking proceeding rather than by adopting an unofficial moratorium abrogating existing rules. The Department cannot claim that an emergency situation requiring immediate action has been established. The moratorium has been in effect longer than the initial rules of the Department. Moreover, as late as 1983, the Department substantially revised its rules and took no action with respect to protecting particular public waters from additional construction.

Having chosen not to demonstrate the need and reasonableness of a complete "no build" solution in a rulemaking proceeding, the Department must show that the application of *Mrs. Orr* will have a material adverse impact on significant fish or wildlife habitat. This it has failed to do. Under such circumstances, the Administrative Law Judge concludes that none of the conditions contained in Minnesota Rule 6115.0210, subp. 3, prohibiting the placement of the structures, has been established.

It should be noted that counsel for the DNR stated at the hearing that the impact of the development on the walleye population of the lake was the reason for denial of the permit, TR. 11.

Minnesota Rule 6115.0211, subp. 4 contains specific standards for the grant of a permit for breakwaters and marinas. The only condition contained in that rule raised at the hearing was the requirement that "alternative dock or inland facilities are infeasible". As demonstrated in the record, there is adequate reason to conclude that an inland facility at the Orr campground is infeasible. Moreover, it is disingenuous of the Department to raise that issue in this proceeding after Mrs. Orr was advised by DNR personnel that such an inland harbor was not feasible on her property. It was, primarily, on the basis of such representations that she proceeded with her current proposal.

Under such circumstances, Mrs. Orr might well argue an estoppel on the part of the Department to raise the issue at this stage of the proceedings. *Hart v. Bell*, 222 Minn. 69, 24 N.W.2d 41 (1946). See, 31 C.J.S., Estoppel, 117. The DNR also in its contacts with Mrs. Orr and in the Order of the Commissioner denied the grant of a permit for an inland harbor.

The Administrative Law Judge, however, need not rely on the presence of an estoppel. The record adequately demonstrates that the area available for an inland harbor on the Orr property would be inadequate and that it would be subject to perpetual clogging from the moving sands experienced at that portion of the lake.

The recent revisions to the DNR rules contain general criteria in addition to those previously discussed limiting the grant of permits for construction in public waters of the state. Minnesota Rule 6115.0210, subp. 5. The requirements of that Rule are satisfied by the Findings which demonstrate the absence of a feasible alternative, including a "no build" alternative and the conditions that the Administrative Law Judge has imposed on the grant of the permit.

While the conditions imposed on the grant of the permit are self-explanatory, a discussion of the alternatives available to Mrs. Orr appears appropriate. As demonstrated in the Findings, no reasonable alternative would alleviate the problem Mrs. Orr experiences in operating her commercial campground. The concern is not for the economic viability of Mrs. Orr's enterprise but for the protection of property and persons using her facility.

The only alternative that the Department seriously suggests is appropriate in this circumstance is the "no build" alternative. The Administrative Law Judge finds that alternative inappropriate. As previously demonstrated, the proposal will have an insignificant impact on the environment. The "no build" alternative, however, will still subject those persons who use Mrs. Orr's facility to the risk of property damage and physical injury. Under such circumstances, weighing the argued precedential effect of granting the permit against the real harm occasioned by the "no build" solution, the Administrative Law Judge finds that it is not a reasonable alternative.

it was suggested at the hearing that the regulations of the Department relating to excavation in public waters for harbors and boatlifts might be relied upon to deny the application herein. The only two sections of the applicable rule advanced by the Department at the hearing for the denial of the permit are contained in Minnesota Rule 6115.0200, subp. 3 A and C. Those two prohibitions, however, parallel the rule regarding the placement of

structures in public waters. The rule prohibits an excavation when there is an alternative means which would result in less environmental impact or when the excavation would be detrimental to significant fish and wildlife habitat or protected vegetation and there are alternative means to mitigate the effects. As demonstrated with respect to the rule regarding the placement of structures in public waters, the proposal of Mrs. Orr represents a minimum impact solution. The proposal will not have an appreciable impact on the fish population of the lake and those minor adverse environmental impacts that can be predicted are subject to acceptable methods of mitigation. Hence, the rule regarding excavations in public waters may not be used to deny the permit.

B.D.C.